

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION**

E.I. DuPONT de NEMOURS, INC.

Employer

and

CASE 3-UC-499

**PAPER, ALLIED/INDUSTRIAL CHEMICAL
ENERGY LOCAL 1-6992**

Petitioner

DECISION AND CLARIFICATION OF BARGAINING UNIT

Upon a petition duly filed under Section 9(b) of the National Labor Relations Act, as amended, hereinafter referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, I find:

The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

E.I. DuPont de Nemours, Inc., hereinafter referred to as the Employer, manufactures two products; Corian, used for such items as counter tops and sink bowls; and Tedlar, used as a protective coating inside airplanes and on top of golf domes. The Employer, and Paper, Allied/Industrial Chemical Energy Local 1-6992, hereinafter referred to as the Petitioner, stipulated at the hearing that the Employer is a corporation with a facility located in Tonawanda, New York, where it has been engaged in manufacturing chemical products. During the past 12

months, the Employer, in conducting its business operations, purchased and received at its Tonawanda, New York facility, goods and materials valued in excess of \$50,000 directly from points located outside the State of New York. Based on the parties' stipulation and the record as a whole, I find that the Employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

The labor organization involved herein claims to represent certain employees of the Employer.

The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

The parties stipulated, and I find, that the Petitioner currently represents employees in the following Unit, hereinafter referred to as the Unit, at the Employer's "Yerkes" plant in Tonawanda, New York.¹

All production and maintenance employees at the Company's plant located near Buffalo, New York, (Township of Tonawanda) including plant clericals and analysts; excluding office clericals, professional employees, guards and supervisors as defined in the Act, and also including in the unit, office clerical employees not exempt under the Fair Labor Standards Act, excluding confidential stenographers and confidential clerks.

The parties stipulated that there are approximately 335 employees in the Unit.

¹ Administrative notice has been taken that the Petitioner's predecessor, Buffalo Yerkes Union, and the Employer were parties to successive collective-bargaining agreements since Buffalo Yerkes Union's certification by the National Labor Relations Board in 1953, as established in Case No. 3-RC-1212. The parties have stipulated that the Employer terminated its most recent collective-bargaining agreement with Buffalo Yerkes Union in 1993, and that there is no successor collective-bargaining agreement in effect to date. The parties have stipulated that certain terms and conditions of the terminated collective-bargaining agreement remain in effect, including the bargaining unit description contained in the terminated agreement.

The Petitioner proposes to clarify the Unit by including the position of site PSM quality assurance/quality control receiving examiner² herein called PSM examiner, held by one employee, Wally Osetkowski. The Employer opposes such clarification. It contends that the disputed PSM examiner is a technical position and does not share a community of interest with the employees in the existing Unit.

The record in the instant case establishes that the following job classifications are included in the Unit: process mechanic, control mechanic, laboratory analyst, stores clerk, receiving clerk, accounting planner, purchasing associate, and quality coordinator-shape. The following job classifications are excluded from the Unit: mechanical engineer, electronic technician, mechanical technician, mechanical integrity reliability engineer, chemical engineer, mechanical engineer, technical engineer, and any supervisor.

Osetkowski testified that he has worked for the Employer for the past five years. Prior to the PSM examiner position, Osetkowski worked for the Employer as a material handler³ in the Corian Close Mold Cast (“CCMC”) section of the plant. Before working for the Employer, Osetkowski worked at Shay Electronics as a supervisory technician in quality control.⁴

A job opening for the newly created position of PSM examiner was first posted at the Yerkes plant on December 4, 2001. Pursuant to the posting, Osetkowski was hired in January 2002 for the position and has held this position since its inception.

Osetkowski’s direct and first line supervisor is Gordon Gaesser, who is a mechanical integrity reliability engineer, a non-Unit position. Gaesser does not supervise any employees

² PSM is the Employer’s acronym for “process safety management.”

³ The record does not establish whether the material handler is a Unit position and the record is silent as to how long Osetkowski has worked in this position.

⁴ The record is silent as to how long Osetkowski has worked for Shay Electronics.

other than Osetkowski. Gaesser testified that he reports to the area superintendent, who in turn reports to the plant manager.

The general duties of the PSM examiner position include, among other things, identifying, isolating, and inspecting all incoming PSM equipment, components, and parts for compliance per a specification, code or standard.⁵ Specifically, the PSM examiner is responsible for the visual inspection of all such equipment including pumps, fittings, machine components, fasteners, processed chemical equipment, piping, sheeters, extruders, maintenance repair items, “O” rings, valves, flanges, heat exchangers, and storage tanks. Osetkowski is not involved in the direct production of Tedlar or Corian products. Rather, he inspects parts and equipment used to manufacture these products. Osetkowski testified that about 60-70 percent of his time is spent visually inspecting PSM critical parts and about 30-40 percent of his time involves physically testing PSM critical parts using instruments.⁶ Both visual and physical inspection takes place at Osetkowski’s workstation in the receiving area.

Presently, Osetkowski works in two areas of the plant: the receiving area and the procurement area. In the receiving area, Gaesser testified that Osetkowski has a workstation sandwiched between the receiving office and the Corian maintenance area. Osetkowski testified that he spends about 90 percent of his time at this workstation. He also testified that the receiving dock where items come in is about 20 to 25 feet away from his workstation. Receiving clerks, who are bargaining Unit employees, work out in the dock area. There are approximately four or five bargaining Unit employees who work in the receiving office. Gaesser testified that

⁵ Specifications, codes or standards used in the PSM examiner position include: SME codes, ASTM spec, STME spec, DIN, GIN, the American Society of Testing Methods, The American Welding Society, The Fire Protection, American Society for Mechanical Engineers (AMSE), New York State law, DuPont standards (including MARI which is the minimum accidental receiving inspection documentation) National Consensus codes and standards, National Fire Protection Agency codes and the American Petroleum Institute (API).

⁶ Although Osetkowski acknowledged that he visually and physically inspects some PSM critical parts, the record does not establish what percentage of his time he spends doing such inspections.

Osetkowski's workstation is about 500 feet from the production area. Both bargaining and non-bargaining Unit employees work in the production area.

The receiving area is also in close proximity to the maintenance shop and maintenance area where a number of Unit employees work, including control mechanics and process mechanics. Gaesser estimated that Osetkowski's workstation is about 15 feet away from the maintenance area by walking around the wall which separates the two. Osetkowski testified that about five to ten feet from the maintenance shop is the maintenance supervisor's office. Adjacent to the maintenance shop is a maintenance break area.

In the procurement area, Osetkowski has his own cubicle where he spends about 10 percent of his time. Osetkowski's cubicle is adjacent to, or in the vicinity of, four purchasing associates' cubicles. The purchasing associates are Unit employees. Osetkowski's cubicle is also either adjacent to, or within the vicinity of, three mechanical technicians. The mechanical technicians are non-Unit positions. Both Osetkowski and Gaesser testified that Osetkowski's cubicle is about 20 feet away from Gaesser's office and the purchasing supervisor's office. Gaesser testified that Osetkowski's office in the procurement area is separated from the production area by walls and hallways and Gaesser estimates that they are about 100 feet apart.

Both Osetkowski and Gaesser are members of the mechanical integrity team⁷ consisting of 11 engineers and technicians whose goal is to implement various programs to ensure that the Employer is complying with Federal and State safety regulations and to ensure that Employer's equipment is safe to operate. Gaesser is the site leader for this mechanical integrity team. None of the team members are Unit employees. Gaesser testified that Osetkowski will bring up issues involving PSM critical parts and the team will work to resolve these problems.

⁷ There are 11 active members of this team and three additional members who are used on an as-needed basis.

During a typical day, a receiving clerk will bring PSM critical parts to Osetkowski at his workstation in the receiving area. Both receiving clerks and Osetkowski have the ability to look up and verify a purchase order in the 3-MCS (maintenance, materials, and management) computer system. Some of the PSM critical parts, such as pipefittings, pipe flanges, standard valves, and pressure vessels, will come with a PNID (Piping and Instrument Diagram). It is Osetkowski's responsibility to compare these PSM critical parts with the PNID diagram to ensure that the parts conform to specifications. Osetkowski testified that he often needs assistance in reading these PNID diagrams, but the record is silent as to how often, to what extent, and as to who assists him in reading them. The record establishes that both Unit employees, such as control mechanics, and non-Unit employees, such as technicians, can read these PNID diagrams and will use them in the course of their work.

Osetkowski also ensures that PSM critical parts conform to specifications by referring to the specification books located in Gaesser's office. Osetkowski uses these books to verify the materials, pressure, and other physical characteristics of PSM critical parts. Gaesser testified that these specification books are available to all bargaining Unit control and process mechanics and that the Employer encourages them to use these references to look up maintenance operating and engineering standards.

In addition to a visual inspection, Osetkowski also physically tests PSM critical items using the following tools: a durometer (to check the hardness of "O" rings), calipers, micrometers (to measure thickness), Rockwell hardness instrument (to measure the hardness of a metallic part), depth gauge, welding gauge, and continuity meters (to make sure a circuit is complete).

After visual and physical inspection, Osetkowski has the authority to determine if the item conforms to specifications and will stamp it accordingly. If the part is conforming, Osetkowski contacts a stores clerk, who is a Unit employee, to pick up the part from Osetkowski and bring it to stores. If the part is nonconforming, Osetkowski e-mails the following non-Unit employees: Gaesser, other mechanical integrity representatives, employees in purchasing, and purchasing supervisors. Ultimately, a non-Unit engineer will make the decision to either return the PSM critical part to the vendor or to keep it. Osetkowski generates a report about once a month of all nonconformances and accomplishments. He also generates a monthly report regarding vendor performance which he gives to Gaesser, the plant manager, and the “unit manager” at Tedlar. Osetkowski is also responsible for keeping a log of the e-mails he has written concerning all nonconformances. Finally, he generates a report for the number of items he has inspected.

Before the creation of Osetkowski’s job in 2001, the record is unclear and disputed as to who ensured that incoming PSM critical parts conformed to specification. Gaesser testified that prior to 1992 he believes that Jack Estford, who was a non-bargaining Unit mechanical technician for Corian at this time, was responsible for checking PSM parts that came into the plant. Gaesser testified that between 1992 and 2001, no one performed these duties. Gaesser also admitted that he came to the Tonawanda plant in 1997 and that he was unsure as to what types of inspections, if any, took place on PSM critical items before 1997. Jeffrey Kasper, a mechanic, testified that before Osetkowski’s PSM examiner position was created, Unit mechanics were mostly responsible for checking if incoming PSM critical parts conformed to specification.

With regard to salary structure and benefits, all Unit and non-Unit employees, management, and supervisors are paid pursuant to the same salary structure and receive the same benefits. Osetkowski is paid \$21.75 an hour. In the Unit, the highest paid mechanic position (grade M-7), earns \$24.99 an hour. When Osetkowski goes on vacation, two non-Unit mechanical technicians will fill in for him. Osetkowski works five days a week from 7:30 a.m. to 4:00 p.m., a schedule similar to that of most Unit employees.⁸ Osetkowski testified that he wears jeans and a collar shirt to work. Osetkowski also testified that most employees in the receiving area as well as the mechanics wear jeans and t-shirts to work. The only exception is that all employees, including Osetkowski, wear a uniform or coverall in “Nomax” areas as a protection from hazardous chemicals.

The Board described the purpose of unit clarification proceedings in Union Electric Company, 217 NLRB 666, 667 (1975):

Unit clarification, as the term itself implies, is appropriate for resolving ambiguities concerning the unit placement of individuals who, for example, come within a newly established classification of disputed unit placement or, within an existing classification which has undergone recent, substantial changes in the duties and responsibilities of the employees in it so as to create a real doubt as to whether the individuals in such classification continue to fall within the category – excluded or included – that they occupied in the past. Clarification is not appropriate, however, for upsetting an agreement of a union and employer or an established practice of such parties concerning the unit placement of various individuals, even if the agreement was entered into by one of the parties for what it claims to be mistaken reasons or the practice has become established by acquiescence and not express consent.

⁸ The record does not establish whether Osetkowski punches a time clock. While Osetkowski’s office is near an employee break room, Osetkowski testified that he does not take a lunch break and rarely takes other breaks. The record discloses that the employee break room is used by Unit mechanics, but does not disclose what other employees may also use the break room.

In the instant case, there is no collective-bargaining agreement in effect and, because the PSM examiner is a newly created position, there is no established past practice concerning the inclusion in, or exclusion of, the position from the Unit. Unit clarification is appropriate for resolving questions concerning the unit inclusion or exclusion of individuals in such newly created job positions. Developmental Disabilities Institute, Inc., 334 NLRB No. 143 (2001), *citing* Union Electric Co., 217 NLRB 666, 667 (1975); Bethlehem Steel Corp., 329 NLRB 241 (1999).

In order to determine whether a newly created position should be accreted into an existing bargaining unit, the Board applies a community of interest test. Mercury Marine Div. of Brunswick Corp 254 NLRB 1120, 1121 (1981). See generally Kalamazoo Paper Box, 136 NLRB 134, 137 (1962). Factors which are relevant in determining whether an individual shares a community of interest with an established bargaining unit are: (1) interchange and contact among employees, (2) degree of functional integration, (3) similarity of employee skills and functions, (4) common supervision, and (5) common working conditions. Kalamazoo at 136-137.

In Mercury Marine, *supra*, at 1121, the Board concluded that a new job classification, Process Coordinator I, shared a sufficient community of interest with unit employees to warrant accreting that classification into the bargaining unit. Thus, Process Coordinator I's worked in the same area as unit employees, shared with them the responsibility of ensuring the quantity and quality of products, worked on the same equipment as them and were integrated with unit employees since they occasionally assisted each other when they had problems operating their respective equipment.

I conclude, as discussed more fully below, that the record establishes that the PSM examiner shares a community of interest with Unit employees. The PSM examiner has substantial contact with Unit employees; performs job duties that are functionally integrated with those of Unit employees; and shares similar skills, working conditions, and has wages and benefits similar to those of the Unit employees. Accordingly, I shall clarify the Unit to include the position of PSM examiner.

(1) Interchange and Contact Among Employees

The Employer, in its post-hearing brief, argues that Osetkowski has minimal daily contact with other Unit employees. Specifically, the Employer claims that Osetkowski does not work on the production floor with other maintenance mechanics and rarely interacts with them. Rather, the Employer asserts that Osetkowski works in two locations; one near the receiving dock and the other in a cubicle in the engineering department⁹ next to the non-Unit technicians.

Although Osetkowski testified that he rarely works with mechanics on a day-to-day basis, the record establishes that Osetkowski interacts with other Unit employees on a daily basis. Osetkowski receives the items he inspects directly from the receiving clerks, who are Unit employees. Osetkowski, after performing the inspection, gives all items that conform to specification to the stores clerk, another Unit employee. The record also establishes that Osetkowski's workstation in the receiving area, as well as his cubicle in the procurement area, are located near the work areas of Unit employees. Thus, the record clearly establishes that Osetkowski has contact and works closely with various Unit employees on a daily basis.

⁹ The Employer, in its post-hearing brief, refers to the area in which Osetkowski works, as the "Engineering Department." However, nowhere in the record is this area referred to as the "Engineering Department." Employer's witness Gaesser, who has an office in this area, also referred to it as the procurement area, as did Osetkowski.

With regard to temporary interchange, the Employer argues that two non-Unit mechanical technicians will fill in for Osetkowski when he is on vacation. However, this fact is of little consequence, as Osetkowski takes vacation once or twice per year.¹⁰

(2) Degree of Functional Integration

The record establishes that the work of the PSM examiner is functionally integrated with the work performed by the Unit employees. Specifically, the record establishes that receiving clerks, who are Unit employees, bring PSM critical parts to Osetkowski's workstation in the receiving area where Osetkowski spends about 90 percent of his time inspecting parts. The inspection process also involves Osetkowski's frequent contact with other Unit employees, and specifically, with the stores clerk in connection with conforming parts. Additionally, the record establishes that the PSM critical items that Osetkowski works with are the same items, which are in turn utilized by Unit mechanics. For example, Albert Moore, an M-7 Unit mechanic testified that his duties include installing, repairing, replacing, and/or verifying tolerances on a number of PSM critical items such as pumps, pipes, and other PSM critical parts. Thus, Osetkowski's work is functionally integrated with that of the Unit employees. See Bennett Industries, 313 NLRB 1363, 1364 (1994) (holding that quality control employees should be included in a production and maintenance unit because they "perform a function which is an extension of and integrated with the manufacturing process.")

The Employer, in its post-hearing brief, argues that Osetkowski is more functionally integrated with non-Unit members because Osetkowski is part of the mechanical integrity team consisting of entirely of non-Unit employees. The record reflects that Osetkowski participates in mechanical integrity team meetings approximately twice a month. However, the record establishes that some key members of the mechanical integrity team also meet every week.

¹⁰ The record is silent as to the duration of these vacations.

However, the record does not establish that Osetkowski participates in these weekly meetings. Osetkowski's participation in bi-monthly meetings with members of the mechanical integrity team is an insufficient basis upon which to exclude him from the Unit, particularly where the record establishes that Osetkowski's work is functionally integrated with that of the Unit employees.

(3) Similarity of Employee Skills and Functions

Osetkowski shares many of the same job skills and functions as Unit employees. Both Unit employees and Osetkowski have access to a procurement card allowing them to place requisition orders with vendors to purchase PSM critical parts. Both have access to the 3-MCS computer system to place or look up purchase orders.

One of Osetkowski's main job functions involves inspecting PSM components to determine whether they conform to specifications. Osetkowski testified that he visually inspects 70 percent of all PSM items. Similarly, mechanical and electrical technicians are required to visually inspect pipes, storage tanks, pressure vessels, and other items. Also, one of the main job functions of the quality coordinator-shape position is to visually inspect product.

Osetkowski also testified that he uses precision measuring instruments about 30 percent of the time in order to make sure that the physical attributes of an item conform to specifications. The Employer argues that although some Unit members use similar measuring tools (such as calipers and micrometers), these tools are mainly used for maintenance and repair and are not used to test PSM components. Regardless of the purpose for which they are used, the record indicates that, like Osetkowski, Unit employees also use calipers, micrometers, durometers, thread gauges and hardness meters.

In its post-hearing brief, the Employer argues that Osetkowski refers to PNIDS in performing his work, as do the non-Unit engineers. However, the record establishes that Osetkowski has little familiarity with these diagrams and cannot read them without assistance.¹¹ Additionally, Osetkowski testified without contradiction that the control mechanics, who are in the Unit, have the ability to read the PNIDS.

While the Employer claims in its post-hearing brief that Unit employees only occasionally consult the specification books that Osetkowski also uses, the record indicates otherwise. Thus, Gaesser testified that the specification books are available to all Unit employees and that the Employer encourages them to refer to these standards for information. For example, Unit mechanics have to reference engineering standards when performing maintenance operating procedures; control mechanics need to refer to these books when looking up grounding and bonding standards; and laboratory analysts consult the specification books to analyze whether incoming materials are in conformance.

The Employer asserts in its post-hearing brief that if an item is nonconforming, Osetkowski sends e-mail messages to non-Unit employees, such as integrity representatives, the purchasing supervisor, and reliability engineers, in order to resolve any problems. However, the record is silent as to how often Osetkowski corresponds via e-mail. That aside, the record establishes that Osetkowski also has daily communications with Unit employees. The Employer also contends that Osetkowski, unlike any of the maintenance mechanics, generates monthly and daily reports of nonconformances. However, there are also a number of Unit employees who are required to generate reports if problems arise. The quality coordinator–shape position requires

¹¹ Although the record suggests that an “engineer in charge of the group” has assisted Osetkowski on occasion, the record is unclear if anyone else has helped him. The record is also silent as to when, how often, and to what degree, such assistance is provided.

report summaries of resolutions of quality-related complaints. Similarly, the accounting planner issues summary reports of cost and production data. Thus, Osetkowski, like the Unit employees, is responsible for generating reports.

The Employer also argues in its post-hearing brief that the educational requirements for the PSM examiner are the same minimal requirements as those for the non-Unit mechanical technician and the electronic technician positions. All three positions require a two-year associates degree in engineering technology. However, the record establishes that there are several Unit positions, which also require a two-year degree. Accounting Planners¹² are required to have an associate's degree in accounting and the laboratory analysts are required to have an associate's degree in chemical technology. Further, Osetkowski testified that he did not meet many of the job requirements listed on the job posting before he was hired. Therefore the Employer's argument concerning this job requirement is not persuasive.

(4) Common Supervision

The PSM examiner is supervised by Gaesser who does not supervise any other employees. While the PSM examiner position does not share common supervision with other Unit employees, it is equally true that this position does not share any common supervision with any non-Unit employees. Separate supervision, standing alone, is an insufficient basis upon which to find a position should be excluded from a Unit. See American Television and Communications Corp 279 NLRB 535, 537 (1986) (holding that sales clerks should be accreted into the clerical unit even though they "work in a separate department, are separately supervised, do not interchange with office clericals, and have little official contact with other office

¹² While a witness testified that "accountants" are in the Unit, documentary evidence in the record indicates that the witness was referring to the Unit position of "accounting planner," rather than accountant.

clericals,” because their functional integration, their similar work hours and benefits, and shared breakroom demonstrate that they share a sufficient community of interest with unit office clericals).

(5) Common Working Conditions

Osetkowski’s working conditions are similar to those of the Unit employees. The record establishes that Osetkowski is paid pursuant to the same salary structure and benefits as the Unit employees. Osetkowski works the same or similar work hours as those worked by the Unit employees. Finally, there is no significant distinction in the work attire worn by Osetkowski and the Unit employees.

Based upon Osetkowski’s frequent contact and functional integration with Unit employees, and the similarity of his skills, job duties, and working conditions to those of the Unit employees, I conclude that PSM examiner shares an overall community of interest with the employees in the Unit. I shall therefore clarify the Unit to include the position of PSM examiner.

ORDER

IT IS HEREBY ORDERED that the existing Unit, represented by the Petitioner, be, and it hereby is, clarified to include the position of site PSM quality assurance/quality control receiving examiner, (PSM examiner).

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 Fourteenth Street, NW, Washington, DC 20570. This request must be received by the Board in Washington by **May 6, 2003**.

Dated at Buffalo, New York this 22nd day of April 2003.

CHARLES J. DONNER, Acting Regional Director
National Labor Relations Board – Region 3
Thaddeus J. Dulski Federal Building
111 West Huron Street- Room 901
Buffalo, New York 14202

03-03239

385 7500
385 7533 2060
420 2900